No. 12521

United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO., a Corporation,

Appellant,

v.

J. W. FEAK, d/b/a J. W. FEAK MERCANTILE COMPANY,

Appellee.

BRIEF FOR APPELLANT

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

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STEVENS-NESS LAW PUB. CO., PORTLAND 9-50

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment (R. 37) of the United States District Court for the Western District of Washington, Southern Division, entered on a verdict

(R. 36) dismissing the complaint and granting damages on appellee's counterclaim.

The District Court had jurisdiction under the provision of 28 U.S.C.A., Sec. 1332 (a) (1).

This Court has jurisdiction to review by appeal the judgment of the District Court under the provision of 28 U.S.C.A., Sec. 1291.

STATEMENT OF CASE

Appellant brought this action for breach of a contract to sell lumber (R. 8). Appellee counterclaimed, alleging failure by the appellant to accept all but two of twenty carloads of lumber which were to have been sold by appellee to appellant at a flat rate of $44.00 per thousand board feet, loaded on cars (R. 6). The agreement, which is the subject matter of the counterclaim represented an attempt to settle certain differences between the parties under the original contract (R. 10). A trial was had under the pre-trial order setting forth the issues of law and fact (R. 2 to 19). The jury returned a verdict (R. 36) in favor of appellee for $5872.18, the full amount of the counterclaim (R. 12, 25). Judgment was entered on the verdict (R. 37).

Appellant moved for an order setting aside the verdict and for a new trial under rule 59 (a) of the Federal Rules of Civil Procedure on the grounds that the verdict was demonstrably contrary to the Court's instructions; that the verdict was demonstrably contrary to the undisputed evidence; that the damages awarded were

grossly excessive; and that the verdict was so excessive and it disclosed prejudice or passion on the part of the jury (R. 38-39). This motion was denied (R. 44) and appellant took this appeal.

STATEMENT OF FACTS

The compromise agreement which was entered into in settlement of a prior controversy between the parties (R. 62, 63, 79, 87 and 88) is evidenced by the letter from appellee to Powers (R. 123) and involved the shipment of twenty carloads of rough green fir or pine of random lengths and widths but of uniform thickness of one, two, three and four inches per carload. The one and two-inch lumber was to be shipped to a designated point and the three and four-inch lumber was to be shipped as directed by appellant's president.

The letter to Powers was written on March 11, 1947. At that time Crow's Price Reporter, which was represented by appellee to be "used throughout the lumber industry as an authority respecting prices and conditions" having a circulation "throughout the full length of the Pacific Northwest . . ." (R. 77), showed that the price of $44.00 per thousand was lower than the then prevailing market.

According to appellee's testimony the appellant refused to accept delivery between the 20th and 30th of March (R. 79). At that time, according to Crow's Price Reporter, one-inch "rough boards" sold at prices in excess of $45.00 per thousand; two and three-inch "rough

dimension" lumber sold at prices in excess of $45.00 per thousand, with most sales being made at $55.00 per thousand.

Had appellee performed under the compromise agreement substantially all of the twenty cars would have been delivered within approximately thirty days of March 11, the date of the agreement (R. 100). This means that substantially all of the lumber would have been available by April 11 (R. 100).

According to Crow's Digest at all times prior to May 1st, one-inch "rough boards" sold at prices in excess of $45.00 per thousand. At all times prior to April 3rd two and three-inch "rough dimension" lumber sold at prices in excess of $45.00 per thousand with most sales made at $50.00 per thousand. And between April 3rd and May 1st most sales of two and three-inch "rough dimension" lumber were made at more than $45.00 per thousand (Exs. 5 and A-4, R. 132).

It is therefore clear that for a period of at least six weeks following the repudiation, an available market existed throughout the Northwest at prices in excess of the contract price of $44.00 per thousand (R. 101, 109-113). Had appellee discharged his obligation to mitigate damages, as the trial Court charged the jury, he would have sold the lumber at substantially more than he claimed to have realized from the resale. In fact he would have realized a profit.

Instead, however, appellee remained idle while he "watched the lumber market which had gone into a decline" (R. 72) and finally sold between June 9 and

August 5 what he claimed to be the lumber rejected by appellant (R. 72). Defendant testified he sold lumber without notice to the plaintiff and he claimed a loss of $5,872.18 (R. 25, 124), which is reflected in the jury verdict (R. 36). The sales took place in small quantities (R. 25), part of the lumber being sold to Bucoda for $32.50 per thousand and the rest to Olympia Harbor at $40.00 per thousand (R. 25, 74-75). According to Crow's Digest, during this period at which the resales took place, this was the price at which "cants" (lumber four inches and over) sold on the market (R. 114). No evidence was offered to show what proportion of the lumber over the 100,000 feet on hand at the time of the breach (R. 72) was one, two, three or four-inch lumber. It is undisputed that the lumber to be delivered under the compromise agreement was not to be all cants (R. 123). It is therefore clear that appellee did not sell the lumber covered by the agreement or, if he did, then he did not sell it at the current rates prevailing in the market (see testimony of appellee's witness Barr 109-114). There is, therefore, no evidence on which the jury could have arrived at a verdict for the precise amount of appellee's claim.

STATUTE INVOLVED

The contract was to be performed in the State of Washington. The governing law is, therefore, that of the State of Washington. At the time of the breach, the Uniform Sales Act was in force in that State. Remington Revised Statutes, Section 5836-64. Section 64 of the Uniform Sales Act provides as follows:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

"(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

STATEMENT OF POINTS TO BE RELIED UPON

1. That the verdict is demonstrably contrary to the Court's instructions.

2. That the verdict is contrary to the undisputed evidence.

3. That the damages awarded are grossly excessive.

4. That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

SUMMARY OF ARGUMENT

Appellant's argument in support of the points to be relied upon may be summarized as follows:

1. The jury disregarded the trial court's charge that appellee was under a duty to mitigate damages and that if there was an available market and if he could have sold the lumber for more than he claimed to have realized from the resale, his damages would have been limited to the difference between the contract price and the amount he could have realized from the sale, or the market price.

There is undisputed evidence of an existing market and the case is, therefore, governed by Sec. 64 (3) of the Uniform Sales Act, Remington Revised Statutes, Sec. 5836-64 (3) As a matter of law the jury could not have found that appellee was diligent and timely in the conduct of the resale.

2. Appellee tried to avoid the rule of Sec. 64 (3) and apply Sec. 64 (2) claiming the difference between the contract price and the resale price. He offered no proof why evidence of the resale price could be used to support his claim for damages. Evidence of resale is

pertinent only where: (1) There is affirmative evidence of the lack of an available market; and the burden of establishing this lack of market is upon the seller, or, (2) Where it is accompanied by evidence of good faith and timeliness in the conduct of the resale.

Here the existence of a market at the time of the breach was proved by Crow's Digest (Exs. 5, A-4, R. 78, 100-101) and by appellee's witness Bar (R. 112-113) and was acknowledged by appellee himself R. 100-101). And the value of that market during the six weeks period following the breach was higher than the contract price. Appellee offered no countervailing proof of good faith in connection with his resales, except his own unsupported assertion that he sold at the best prices he could get (R. 72, 97, 104). This is insufficient, at best (Derami, Inc. v. John B. Cabot, Inc., et al., 273 App. Div. 717; 79 N.Y.S. 2d 664 (1948)), if it does not affirmatively establish that appellee conducted the resales in bad faith.

ARGUMENT

Point 1

The jury disregarded the trial court's charge that appellee was under a duty to mitigate damages. As a matter of law the jury could not find that appellee was diligent and timely in the conduct of the resale.

The case is controlled by Section 64 (3) of the Uniform Sales Act, Remington Revised Statutes, Section

5836-64 (3) which limits damages for non-acceptance of goods, where there is an available market, in the absence of special circumstances, to the difference between the contract price and the market price at the time when the goods ought to have been accepted.

Here, however, appellee attempted to measure his damages by the difference between the contract price and the amount realized on resales some two or three months after the breach (R. 25, 72). Crow's Price Reporter which was admitted by appellee to be "an authority respecting prices and conditions", "throughout the lumber industry", "having a general circulation", "throughout the full length of the Pacific Northwest" (R. 77), conclusively establishes the existence of a market at all times from the breach up to and including the time of the resales. And on cross examination appellee's witness Barr testified that the quotations shown in Crow's indicate that the lumber could have been disposed of on the West Coast at the quoted prices (R. 112-113). The market was clearly in existence and in fact for a period of about six weeks after the breach it was higher than the contract price of $44.00 per thousand (Exs. 5 and A-4, R. 132). Accordingly, appellee could have sold the lumber during this period and realized a profit as a result of appellant's breach. It must therefore follow that appellant is entitled, at most, to nominal damages. Furthermore, Crow's shows that the only lumber which sold at prices alleged to have been received by appellee from the resale were cants (R. 114). Since appellee claims to have resold the one and two-inch lumber at these prices he therefore must not have

received the best prices obtainable as quoted in Crow's. As a matter of law therefore appellee was not diligent and the jury could only have awarded appellee his damages in disregard of the trial court's charge.

Hartman Pac. Co., Inc. v. Estee, 127 Wash. 151, 219 Pac. 867 (1923), on rehearing 131 Wash. 697, 229 P. 326 (1924), was an action for non-acceptance of two thousand cases of canned salmon tendered on Dec. 1, 1913. The seller immediately notified the buyer that he would sell the salmon and hold him liable for any loss sustained. The sales were made between April 19, 1920 and February 28, 1921 and judgment was for the difference between the contract price and the resale price. The Court, in reversing the judgment on the ground that the resales were not made within a reasonable time, remanded the case with instructions to enter judgment in favor of the seller for nominal damages only. The Court said:

> "There seems to be no escape from the conclusion that by the exercise of reasonable diligence the respondent could have sold the salmon, within the next 3 or 4 months after December 1st, upon the market for a price of approximately $2 per dozen, which was only 15 cents less than that at which respondent had contracted to sell it to the appellants. This it did not do, but sold it upon a further receding market beginning in the April following and continued to dispose of it in small lots during the next 9 or 10 months at continually receding prices. It is true the trial court found that the salmon was sold within a reasonable time, but this is not a finding of fact upon substantially disputed testimony. It is rather a conclusion from the facts about which there can be little dispute."

In Washam v. Wood, 177 Wash. 183, 31 Pac. 2d 508 (1934), the seller brought an action for non-acceptance of 20 tons of wheat at $34.00 per ton. Instead of the seller reselling immediately to establish his loss or to prove the market value, the seller waited and then sold the wheat at a loss. The Court in reversing a judgment based upon the difference between the contract price and the resale price said:

> "According to respondent's own testimony, the market value of the wheat when it was threshed was $34 per ton, the contract price. Therefore, there was no loss occasioned by the breach. Having notified the grain company of the time and it having failed to live up to its contract to take the wheat from the machine, respondent was free to sell it at once and could have thus realized the contract price. That he did not choose to take immediate advantage of the breach and resell the wheat was his own choice, and he cannot hold the grain company for the subsequent fall in the market price."

See also A. B. Fosseen & Co. v. Kennewick Supply and Storage Co., 144 Wash. 67, 256 Pac. 779 (1927); Hess v. Seitzick, et al., 95 Wash. 393, 163 Pac. 941 (1917).

And in Hughes v. Eastern Ry. & Lbr. Co., 93 Wash. 558, 161 Pac. 343 (1916), the Court said that where a market existed and no damage would result if he availed himself of the market, the seller was not entitled to damages for the breach:

> "Where there is a market, it is the duty of the aggrieved party to practice diligence, to the end that the loss may be as 'small as possible.' And we

think this is the rule governing this case. The reasoning which sustains the rule is simple. It is that damages are allowed as compensation for actual monetary loss, and if the vendor can find a market equal or better than that provided in his contract, there is no loss to compensate."

In Sheldon v. Argos Mercantile Corp., 194 App. Div. 472, 185 N. Y. Supp. 513 (1920), affirmed 233 N.Y. 585, 135 N.E. 928 (1922), the seller could have sold the goods at the time of the breach in Cuba, the place of delivery, at a price exceeding that which defendants agreed to pay. Instead of this plaintiff chose to speculate, and to that end shipped the sugar to France. A loss at sea of part of the sugar resulted in a loss of profits upon which the claim for damages was based. The Court said, at page 517:

"The judgment appealed from must be reversed. From the plaintiff's own testimony no damages were suffered. While there was a question of fact for the jury respecting a breach of the contract by the defendants, still the plaintiff absolutely failed to establish damages by any competent proof and under his own testimony the market value of the sugar at Havana, upon the date of the alleged breach, and for a long period of time thereafter, was at least equal to the contract price, and the sugar was thereafter sold in France by the plaintiff and his co-adventurer for $2.40 per 100 over the price fixed in the contract with the defendant. Clearly the defendant cannot be called upon to respond in damages for the failure of plaintiff's speculations. . . ."

The case at bar is on all fours with Chozo Yano, et al. v. Ledman, et al., 188 N. Y. Supp. 764 (N.Y.C. 1921), where the breach occurred on Dec. 4 at which time the

market price (of pongee) was $19.55 per piece. The plaintiff did not dispose of the merchandise until Dec. 28 when the market had dropped to $17.00 per piece. Between Dec. 4 and Dec. 28 the evidence showed that the market had been low. The plaintiff contended that the resale price was the best price obtainable at that time.

The jury rendered a verdict based upon the price realized on the resale of the merchandise. The trial judge in setting aside the jury verdict said:

> "The measure of the plaintiff's damages was the difference between the contract price and the market value of the merchandise at the time that the contract was breached, and if the plaintiff continued to correspond with the defendants between Dec. 4 and the 20th of Dec. by withholding the sale of said merchandise with the hopes that the defendants would cable to Japan, through their bank, a letter of credit for the amount of the contract, it was their own fault. The market on Dec. 4 was $19.50, and if the merchandise were sold when the market was high, at the price then prevailing, the defendants would have been compelled to pay the difference between the agreed price and the market price, to-wit, 50 cents per piece, or about $100.00. It was incumbent upon the plaintiff to use reasonable diligence in disposing of the merchandise so that it would be damaged as little as possible. (Citing cases.)
>
> "We must bear in mind that by the retention of the merchandise by the plaintiffs after the breach occurred, to-wit, Dec. 4, 1920 to Dec. 28, when an opportunity prevailed on the 4th day of Dec. to dispose of said merchandise at a higher price than what was obtained when said merchandise was sold on the 28th day of Dec., the amount found

by the jury was in excess of the amount that the plaintiffs would be entitled to. The Court charged the jury that if they believed that the plaintiffs were entitled to recover, the damages would be the difference between the contract price and the market price at the time of the breach. The jury, in rendering their verdict in the sum as found by it, assessed the damages that plaintiffs had sustained at the market price that was obtainable on the 28th day of Dec. 1920, to-wit, the sum of $17.00 per piece, and awarded the plaintiffs a verdict for $1200.00.

"The jury disregarded the Court's charge as to the measure of damages that the plaintiffs were entitled to and for this error in enhancing the amount of damages the motion of the defendants must be granted for the failure of the plaintiffs in not disposing of the merchandise at the market which was then prevailing on the 4th day of Dec., when the breach occurred. The defendants are therefore entitled to a new trial as a matter of right and not as a matter of favor, for the mistake of the jury, without costs, to which the plaintiffs may have an exception."*

See also Worcester Bleach & Dye Works v. Dlugasch, 181 N. Y. Supp. 44, in which the Court set aside a verdict and ordered a new trial where a resale had been made without previous notice, for a price substantially below the market price, holding that in such a case the resale price was unfair as a matter of law.

Here the undisputed evidence is that there was an available market for the lumber at all times from the

*This was reversed in Chozo Yano, et al. v. Ledman, et al., 192 N. Y. Supp. 647 (1922), on the ground that it was stipulated at the trial that the breach occurred not on Dec. 4 but on Dec. 20. Since the market price on that date was $16.55 per piece the appellate court found that the verdict was not sufficiently excessive so as to warrant its being set aside. Nevertheless the law as stated by the trial judge is eminently correct and the case is still good authority despite its reversal which was based upon a stipulated fact ignored in the original opinion.

time of the breach, i.e., the latter part of March (R. 79) up to and including the period during which the resales took place, i.e., June 9th to August 5th. And for about six weeks from the time of breach, appellee could have sold the entire quantity of lumber at prices in excess of the contract price of $44.00 per thousand (R. 77, 79, 101).*

The jury verdict was therefore contrary to the Court's charge on the appellee's duty to mitigate damages, and the trial court erred in not setting it aside.

Point 2

There is no evidence that appellee's alleged resales were timely or made in good faith and therefore no evidence to support the verdict and judgment for the difference between the contract price and the amount realized on resales.

If we assume, as the Court below did (R. 42), that the jury was free to disregard Crow's Price Reporter, the record would then be devoid of *any* evidence of market value at *any* time. Under these circumstances, the evidence as to the amount realized on the resales is insufficient to support the verdict without affirmative proof of good faith and timeliness in the conduct of the resales. No such evidence appears in the record, and there is

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*There were received in evidence copies of Crow's Lumber Price Reporter (Exs. 5, A-4, R. 132), which show that at all times between March 20th and May 1st, one-inch "rough boards" sold at prices in excess of $45.00 a thousand. At all times prior to April 3d, two-inch and three-inch "rough dimension" lumber sold at prices in excess of $45.00 a thousand, with most sales being made at $50.00 a thousand, and between April 3d and May 1st, most sales of two-inch and three-inch "rough dimension" lumber were made at more than $45.00 per thousand.

therefore no competent evidence of the extent of appellee's loss.

In Magnes v. Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879 (1900), the Court, in reversing a judgment in favor of a seller on the ground that in view of the evidence the difference between the contract price and the resale price was not a proper measure of damages, said:

> "The result of a resale can never control the question of damages against the defaulting vendee, nor be given in evidence to that end, unless the vendor has satisfactorily proven that he exercised the right in good faith, and at such time, and in such manner, and by such methods, and under such circumstances as were best calculated to protect the rights of the defaulting vendee, and secure the best market price for the property."

In Hess v. Seitzick, et al., 95 Wash. 393, 163 Pac. 941 (1917), the seller resold butter from about a month and a half to 3 months after its rejection by the purchaser. Some of the butter was sold for more than the contract price and some for less. A judgment based upon the difference between the contract price and the amount realized on resale was reversed and a new trial granted, the Court saying:

> "The seller [in executory contracts of sale] is not bound to resell, in order to ascertain the value; he may either resell, or rely upon other evidence of value, at his option. If he does resell, he must, in order to have the result available as evidence of value, pursue, in substance, the same course as that required of a vendor who sells to enforce his lien; that is, he must sell in good faith, within a reason-

able time, after notice in the customary manner, and at the place of delivery, or, if there be no market there, then in the nearest and most available market."

In Crawford v. Dahlenberg, et al., 221 Mo. App. 600, 283 S.W. 65 (1926), the wool was rejected on May 19th, and on May 29th, there being no market for the goods where they were to have been accepted, the plaintiff shipped the wool to the nearest available market, with instructions to sell at no less than the contract price. Being unable to obtain that price, the wool was finally sold on July 28th at eight cents less a pound than the contract price. The verdict for plaintiff was reversed, the Court holding as a matter of law that the plaintiff did not use due diligence in disposing of the wool, saying:

"The manner of sale is within the reasonable discretion of the seller; but it should be made in good faith and in the mode best calculated to produce a fair price for the goods, and, as the seller acts as agent of the original buyer, he is held to the same degree of care, judgment, and fidelity as an agent in possession of goods with instruction to sell to the best advantage. 35 Cyc. 523, 524.

" . . . For plaintiff to have insisted that his commission agent not sell the wool for less than 38 cents a pound under the circumstances was certainly not due diligence.

"Under the circumstances the sale was not fairly made, and plaintiff is entitled to recover (if anything) the difference between the sale price and the actual market value of the wool at Kansas City at the time of the breach of the contract." (Citing cases)

Obrecht v. Crawford, et al., 175 Md. 385, 2 Atl. (2d) 1, 119 A.L.R. 1129 (1938), was a seller's action for non-acceptance of perishable Argentine flour at the contract price of twenty-six dollars per ton. The seller resold immediately following the repudiation in England and sued to recover the contract price less the amount realized on resale. Affirming a verdict in this amount the Court undertook to state "the legal principles affecting the rights and remedies of a seller who is himself without fault against a buyer who wrongfully fails to accept the goods sold to him under a sales contract."

> "Where the goods are of a perishable nature, the right of the seller to re-sell them is settled, Code, Art. 83, Sec. 81, but where he elects to resell, he must do so within a reasonable time and in such a manner as to secure the best obtainable price, 1 U.L.A. sec. 60 LV p. 314, and he is bound to exercise reasonable care and diligence to that end, Ibid, Code, Art. 83, Sec. 81, subsec. 5; 2nd Ed. Tiffany on Sales 350, 55 C.J. 1055 et seq.; Kahn v. Carl Schoen Silk Corp., 147 Md. 516, 530, 128 A. 359, 44 A.L.R. 285; Williston on Sales, secs. 546, 547; 24 R.C.L. 114; 42 L.R.A. N.S. 682.
>
> "Where there has been an actual resale the measure of damages is formally different, since there it is the difference between the lesser price realized at the resale and the contract price, if the resale was made in good faith, Kahn v. Carl Schoen Silk Corp., supra, page 532, 128 A. 359. A sale in good faith is a 'fair sale . . . according to established business methods, with no attempt to take advantage of the vendee', Ackerman v. Rubens, 167 N.Y. 405, 60 N.E. 750, 751, 53 L.R.A. 867, 82 Am. St. Rep. 728, and the burden of proving that the sale was so made seems to be upon the seller, Williston on Sales, sec. 547."

In Williston on Sales, Revised Edition (1948), the author says:

> "The market price may usually be proved by a resale of the goods at the proper time and place in a fair manner; but the price actually obtained at the resale is not conclusive." (Sec. 582) See Annotations in 44 A.L.R. 215; 119 A.L.R. 1142.
>
> "One important purpose of reselling the goods is to fix the measure of the buyer's liability for failure to fulfill his obligation. In order that the sale should furnish an accurate test of the seller's injury, and the buyer's wrong it is necessary that the sale should be properly made. . . ." (Sec. 546)
>
> "Unless the resale is made about the time when performance was due it will be of slight probative force, especially if the goods are of a kind which fluctuate rapidly in value, to show what the market price actually was at the only time legally important." (Sec. 550a)

The Court's opinion in the Obrecht case shows that the seller went to great lengths to sustain the burden of proof on this point. It refers to testimony "that the flour was shipped to England 'endeavoring to sell it at the best price and even utilizing for this purpose previous contracts we had pending at a price considerably over the market price at the time of shipment' and that because of the perishable nature of the goods it was deemed best to resell it 'within a week' after 'the specified time' and that part of the shipment was sold at fully 20% over the highest market price on the day of shipment."

By contrast, the record in the case at bar is devoid of any evidence whatsoever that the resales were made

diligently and in the mode best calculated to produce a fair price for the goods other than appellee's bare assertion that he got the best price obtainable (R. 72, 97-98, 104).

His testimony was even weaker than that discussed in Derami, Inc. v. John B. Cabot, et al., 273 App. Div. 717, 79 N.Y.S. (2d) 664 (1948). There the Court categorically rejected the resale price as a basis for measuring the plaintiff's recovery. That case was a seller's action for non-acceptance, on Dec. 16, 1946, of some 34,000 dozens of cans of tooth powder at $1.05 per dozen cans. On Jan. 13, 1947, the seller notified the buyer of his intention to resell and to hold the buyer liable for any loss sustained therefrom. The merchandise was sold on Jan. 16 at ten cents per dozen cans. Thereafter obtaining a better offer, the seller paid the first purchaser $2581.00 to be released from the sale and sold about three-fourths of the cans for sixty cents per dozen. The trial court, sitting without a jury, awarded damages based upon the difference between the contract price and the amount realized on the resale after deducting the $2581.00 and other expenses. There was no proof offered to show whether a market existed at the time of the breach and if so what that price was. The only evidence offered was the testimony of plaintiff's president to the effect that plaintiff had tried to sell the merchandise to many firms and that the sixty cent price was the best obtainable.

In reversing the judgment and granting a new trial on the ground that there was a total lack of evidence

that the resale price represented the market value at the time and place of the breach, the Appellate Division said:

> "The only relevance which any resale could have would be to furnish evidence of market value, in the event there was an available market for the goods, or, if there was no such market, then to aid in determining what was the loss directly and naturally resulting from the buyer's breach of contract.
>
> " . . . there is no testimony in the case by anyone familiar with the business concerning whether there was an available market for the goods. If there was no such market, the price on resale could not be regarded as evidence of market value. . . ."

Another reason mentioned in the Derami case why the resale price cannot be accepted as representing the market value

> " . . . is that market value on Feb. 10, 1947, has not been shown to be evidence of what it was on the performance date of Dec. 16, 1946.
>
> "In any event, a single sale of a portion of the goods, . . . on Feb. 10, 1947, cannot be regarded as proving that there was an available market for the goods at that time in the absence of any testimony to that effect. . . ."

The circumstances that plaintiff's president testified that he previously offered to resell to other people failed, the Court said, to fill the hiatus in the proof since:

> " . . . there was nothing to show that those firms were the principal ones who would be interested in buying that type of tooth powder, nor does the conclusion follow of itself that there was no available market for the reason that these firms did not wish to buy.

" . . . The object in view is to arrive at the realizable value of the goods at the time when the contract should have been performed, and to subtract that from the contract price in order to arrive at the damages. We cannot hold, in the absence of testimony by anyone familiar with this type of business, that such damage is established on the basis of this record without being informed on whether the sale represents either the market price in case of an available market for the goods, or that the resale was a fair test of the actual value in the absence of an available market. . . .

"A new trial must be had in order to determine whether there was a market value for this tooth powder on the date specified for completion of the performance of the contract, Dec. 16, 1946; and, if so, the amount thereof, or, if there was no market value on that date, then to determine in accordance with this opinion the loss directly and naturally resulting, in the ordinary course of events, from the defendant buyer's breach of contract. . . ."

And in Frankel, et al. v. Foreman & Clark, 33 Fed. 2d 83, 2 Cir. (1929), an action to recover damages for failure to accept and pay for certain coats sold by plaintiff to defendant, the only proof of loss offered was the amount realized on the resale of the coats about two and one-half months after their return by defendant. The verdict awarded damages based on the difference between that sum and the contract price. The Court reversed a judgment for plaintiff for the difference, saying per Hand, A. N. J.:

" . . . The resale was only to ascertain the value at that time. But the testimony indicates that November 16th when the coats were returned, was the height of the season for this merchandise, and no attempt was made to sell it until after December

> 7th, when there was a low market. In such circumstances, a sale on the 1st of February could hardly be regarded as any evidence of the market value of the 360 coats at the time of the breach. There not only was no proof that the market value of the goods had not changed between the date of the breach and the time of the resale, but the testimony seems to indicate that it had. *The amount received at such a sale furnished no basis for computing damages.* Waumbeck Mfg. Co. v. Alfrandi, et al., 196 App. Div. 64, 187 N. Y. Supp. 439, Bonynge v. Carex Co. (Sup.) 188 N. Y. Sup. 751. It is true that what is a reasonable time within which to make a sale, in order to furnish an estimate of the market value is, within proper limits, a question for the jury (Hausman v. Buchman, 189 App. Div. 597, 179 N. Y. Sup. 26); but the testimony should at least not show that the market had fallen between the date of the breach and the time when the sale was made." (Italics ours)

It should be noted that in the case at bar the testimony did show that the market had fallen between the date of the breach and the time when the resales were made and that appellee was well aware of that change since he testified: "I watched the lumber market which had gone into a decline" (R. 72). Yet the record is totally devoid of evidence of any fact which could justify appelleee in withholding the resale of this lumber for about two months while he "watched the lumber market which had gone into a decline" or of any fact which could justify a verdict fixing the amount of his recoverable loss by reference to resales so made.

In Waumbeck Mfg. Co. v. Alfandri, et al., 196 App. Div. 64, 187 N. Y. Supp. 439 (1921), the Court said:

> " . . . [A] resale a month thereafter is not evidence of the market or current price at the time the goods ought to have been accepted, without an allegation in the complaint that the market was the same or any reason assigned why the resale was not made forthwith at the time of the non-acceptance, or of what was the market value at the time."

See also Sonken-Golamba Corp., et al. v. Butler Iron & Steel Co., 119 Fed 2d 283, 8 Cir. (1941), Cert. den. 314 U.S. 683; Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136, 29 N.E. 2d 649, 130 A.L.R. 1331.

Thus, giving appellee the benefit of the doubt respecting his good faith, the best that can be said for the record is that it is without any evidence which would justify the jury in fixing the amount of appellee's loss at $5872.18.

CONCLUSION

The verdict was therefore based upon an erroneous rule of damages in disregard of the Court's charge, or, if considered to be based upon a correct rule of damages, was not supported by any evidence. The judgment should be reduced to a nominal sum or a new trial ordered to establish the amount of appellee's recoverable loss.

Respectfully submitted,

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